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IN THE

Supreme Court of the United States

October Term, 1968
No. .....
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THE PENNWICK CORPORATION, a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Respondent.

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

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MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

Respondent, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

Opinion Below

The opinion of the California Court of Appeal dated May 10, 1968, is attached hereto as Appendix "C".

Statutes Involved

The principal statutes concerned herein are sections 24749 through 24757 of the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9)

attached hereto as Appendix A, and section 99 of Title 4 of the California Administrative Code attached hereto as Appendix B. These statutes involve California's *mandatory* minimum retail price maintenance system for liquor sold at retail in California.

Questions Presented

Appellant's Jurisdictional Statement presents the following questions:

(1) Whether or not the California Liquor Price Fixing Laws (§24755 of the Business and Professions Code) are invalid as being in violation of the Anti-Trust Laws of the United States (15 U.S.C.A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

(2) Whether or not section 24755 of the Business and Professions Code and Title 4, Rule 99, California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Due Process and the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.*

Respondent respectfully submits that such contentions are erroneous and that no substantial federal question is presented in this apeal.

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*At pages 4-5 of its Jurisdictional Statement appellant presents four other questions, subparagraphs 2(a), (b), (c) and (d), which it states are presented by the within appeal. However, in the body of its Jurisdictional Statement appellant brushes over these four questions by merely stating some of the questions again without any argument or citations of authority. We will not discuss these latter questions as we do not deem that appellant intended that they should be taken seriously.

Statement of the Case

This state court case involves the State of California's regulation and control laws, the retail sale of liquor in California under the Twenty-first Amendment to the United States Constitution, under Article XX, Section 22 of the California Constitution and under the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9 §§ 23000 to 25762).

This case deals specifically with the California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance system for the retail sale of liquor in California. This very same type of alcoholic beverage control system has already been before this Honorable Court in *Schwartz v. Kelly*, 140 Conn. 176, 99 A.2d 89 (1953), and this Court dismissed the appeal therein for want of a substantial federal question, 346 U.S. 891.

The main thrust of this case in the California Court of Appeal involved a *state issue* as to what constituted proper publication of the minimum retail prices under former section 24755(b) of the California Alcoholic Beverage Control Act. In addition, appellant also made an attack on the validity of section 24755 of the California Alcoholic Beverage Control Act, as amended in 1961, on the grounds that it allegedly involved an unlawful delegation of legislative power and that it allegedly eliminated any requirement of fair and open competition.

While the appellant raised various possible federal questions in his proceedings before the California Department of Alcoholic Beverage Control and the California Alcoholic Beverage Control Appeals Board, we

would note that the California Alcoholic Beverage Control Appeals Board's decision rests solely upon the *state issue* regarding what constitutes proper publication of the minimum retail prices under the provisions of former section 24755(b) of the California Alcoholic Beverage Control Act.

As shown by the California superior court clerk's transcript, appellant did not issue, urge or attempt to litigate in the California superior court the validity of the statutes involved herein on either state or federal grounds. The pleadings and judgment of the California superior court clearly demonstrate that this case in the superior court involved only the singular *state issue* regarding publication of the prices.

Only when the case reached the California Court of Appeal, and following the filing of the California Department of Alcoholic Beverage Control's opening brief dealing with the singular *state issue* concerning the publication of the prices, did the appellant raise for the first time in the California courts the validity of the statutes involved herein.

In the California Court of Appeal appellate challenged the validity of the statutes on the ground that the statutes allegedly violated due process under the California Constitution in that the statutes allegedly provided for an unlawful delegation of legislative power, and on the ground that the states allegedly violated the California Cartwright Act (Calif. Anti-Trust Act) because of an alleged elimination of fair and open competition. This appellant did not raise any issue with respect to the statutes establishing two trading areas in California.

ARGUMENT

I

Both Traditionally and Under the Twenty-First Amendment, a State Has Broad Regulatory Powers Over Alcoholic Beverages Destined for Use, Distribution or Consumption Within Its Borders

Both traditionally[1] and under the Twenty-first Amendment[2] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been unconditional.

Except for cases involving: (a) foreign commerce[3], (b) import-export[4], (c) interstate commerce in transit

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[1]*Mugler v. Kansas,* 123 U.S. 623, 657-671 (1887); *Crowley v. Christensen,* 137 U.S. 86, 91 (1890); *Giozza v. Tiernan,* 148 U.S. 657, 661-662 (1892); *Cronin v. Adams,* 192 U.S. 108, 114-115 (1904); *Cox v. Texas,* 202 U.S. 446, 451 (1906); *Purity Extract Co. v. Lynch,* 226 U.S. 192, 201 (1912); *Seaboard Air Line Ry. v. North Carolina,* 248 U.S. 298 (1917); *Crane v. Campbell,* 245 U.S. 304, 307 (1917); *McCormick & Co. v. Brown,* 286 U.S. 131, 140-141 (1932).

[2]*State Board of Equalization v. Young's Market,* 299 U.S. 59, 63-64 (1963); *Mahone v. Triner Corp.,* 304 U.S. 401 (1938); *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939); *Ziffrin v. Reeves,* 308 U.S. 132, 138 (1939); *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293 (1945).

[3]U.S. Const. Art. I, § 8, cl. 3; *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964); *Department of Alcoholic Beverage Control v. Ammex Warehouse Co.,* 378 U.S. 124 (1964).

[4]U.S. Const. Art. I, § 10, cl. 2; *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964); *Low v. Austin,* 13 Wall. 29 (1871); and see *Parrott & Co. v. San Francisco,* 131 Cal.App. 2d 332, 280 P.2d 881 (1955).

through the regulating state[5], (d) federal enclaves[6], and (e) possible intolerable burdens on interstate commerce *outside* of the regulating state[7], this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[8]

As but recently set forth by this Honorable Court in *Seagram & Sons v. Hostetter,* 384 U.S. 35 at 41-43 (1966):

> ". . . The appellants attack § 9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.
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> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-

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[5]*Duckworth v. Arkansas,* 314 U.S. 390 (1941); *Carter v. Virginia,* 321 U.S. 131 (1944); *Gordon v. Texas,* 355 U.S. 369 (1958).

[6]*Collins v. Yosemite Park Co.,* 304 U.S. 518 (1938).

[7]*Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966). Cf, *United States v. Frankfort Distllleries,* 324 U.S. 293, 299 (1945).

[8]*Schwartz v. Kelly,* 346 U.S. 891 (1953), appeal dismissed for want of a substantial federal question; *California v. Washington,* 385 U.S. 64 (1958), motion to file complaint denied; *Hooper v. Duncan,* 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; *Plaza Liquor Stores, Inc. v. City of Atlanta,* 381 U.S. 914 (1965), cert. denied; *Laird & Co. v. Cheney,* 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; *Inman v. City of Miami,* 389 U.S. 1048 (1968), cert. denied.

First Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held. 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two Terms ago we took occasion to reiterate that 'a State is totally unconfirmed by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations) . . .

". . . the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude, for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause.[18] (Citation) No such situation is presented in this case. The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." . . . (Footnote omitted.)

In *Indianapolis Brewing Co. v. Liquor Commission*, 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation

of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner Corp.*, 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

In the recent case of *California v. Washington*, 358 U.S. 64 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, §2; *Indianapolis Brewing Co. v. Liquor Commission, supra; Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395; *Mahoney v. Joseph Triner Corp., supra;* and *State Board of Equalization v. Young's Market*, 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936):

> ". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights[9], and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the

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[9] *Crowley v. Christensen*, 137 U.S. 86, 91 (1890); *Crane v. Campbell*, 245 U.S. 304, 308 (1917).

Fifth and Fourteenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders.[10]

And with respect to the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance requirements for liquor to be sold at retail in California, this Honorable Court has clearly set forth that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders".[11]

II

The California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System Regulates the Retail Sale of Liquor Within the Borders of California and Provides for Orderly Marketing Conditions and the Promotion of Temperance in Connection Therewith

As part of its overall statutory scheme for the regulation and control of alcoholic beverages destined for use, distribution or consumption within its borders, California has for nearly thirty (30) years (1939-1968) prescribed a *mandatory* minimum retail price main-

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[10]U.S. Const., 21st Amendment; *California v. Washington*, 358 U.S. 64 (1958), and the authorities cited in footnotes 1 and 2, *supra*.

[11]*Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341, 344 (1964); *United States v. Frankfort Distilleries Inc.* 324 U.S. 298, 301 (1945); and see *Washington Brewers Institute v. United States*, 137 F.2d 964 (1943), cert. denied 320 U.S. 776; *Schwartz v. Kelly*, 99 A.2d 89 (1953), cert. denied 346 U.S. 891.

tenance system for the retail sale of liquor in California.[12]

The purpose and function of the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor[13]—the promotion of both orderly marketing conditions and temperance in the retail sale of liquor in California by the elimination of price wars and cut-rate sales—is set forth at length in the California Supreme Court's recent reaffirmation[14] of the validity of said laws in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349 (Dec. 1966), 420 P.2d 735, wherein the California Supreme Court comprehensively dealt with and rejected the very same arguments which this appellant is now attempting to advance in his jurisdictional statement herein.

As set forth by the California Supreme Court in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra,* 420 P.2d 735 at 742-748, (most footnotes omitted):

> "Plaintiff first contends that these provisions are unconstitutional because they exceed the police power of the state. In passing upon the validity

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[12]§ 99, Title IV, Calif. Admin. Code and Rule 42, Calif. State Board of Equalization (1939-1947); §§ 55.6 and 24749 through 24881, California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) (1947-1968).

[13]The California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance law for liquor (§§ 24749 to 24757, Calif. Bus. & Prof. Code) is to be distinguished from California's *permissive* general fair trade law for ordinary commodities (§§ 16900 to 16905, Calif. Bus. & Prof. Code).

[14]See the California Supreme Court's earlier decision unholding the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor: *Allied Properties v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 141 (1959), 346 P.2d 737.

of that contention, we exercise an extraordinary power over a coordinate branch of government and perform a correspondingly narrow function: we simply determine whether the statute reasonably relates to a legitimate governmental purpose. In so doing, we find the requisite relationship in the absence of an unquestionable contrary showing. (Los Angeles Met. Transit Authority v. Public Util. Com. (1963) 59 Cal.2d 863, 867; Wholesale T. Dealers v. National etc. Co. (1938) 11 Cal.2d 634, 646.) We must not confuse reasonableness in this context with wisdom. '"The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded . . ." Ferguson v. Skrupa, 372 U.S. 726, 728-730.' (Joseph E. Seagram & Sons v. Hostetter (1966) 384 U.S. 35, 47.)

"To incant these precepts in form and ignore them in substance is to disregard the most basic postulates of representative government; yet, as one court has observed, 'the courts of last resort that have rejected fair trade acts on constitutional grounds seem to have . . . done so because of an unwillingness to accept the legislative judgment as to the economic facts.' (Home Utilities Co. v. Revere Copper & Brass, Inc., supra, 209 Md. 610, 617.) On such debatable matters the Legislature properly serves as the court of last resort. When, as in this case, 'appeal is made to liberties which derive merely from shifting economic arrangements' (Kovacs *v.* Cooper (1949) 336 U.S. 77, 95 (Frankfurter, J., concurring)),

the judgment of the Legislature reaches this tribunal with a momentum for respect lacking when the Legislature tampers with 'those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society.' (Ibid.) With these admonitions in mind, we turn to plaintiff's contention that the retail price maintenance provisions of the Alcoholic Beverage Control Act bear no reasonable relation to any legitimate governmental purpose.

"The Legislature adopted the Alcoholic Beverage Control Act 'for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.' (Bus. & Prof. Code, § 23001.) With regard to the retail price maintenance provisions specifically, the Legislature made its purpose plain: It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages . . . for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as

a matter of legislative determination.' (Bus. & Prof. Code, § 24749.)

"The promotion of temperance in the consumption of alcoholic beverages and of orderly conditions in their marketing clearly constitute proper legislative objectives. The declared purposes of the Alcoholic Beverage Control Act in general and of its retail price maintenance provisions in particular are therefore entirely legitimate, and we must sustain the price maintenance provisions if they bear a reasonable relationship to any of those purposes.

"We turn first to the purpose of promoting temperance. The retail price maintenance provisions proceeded on the assumption that 'the elimination at the retail level of price cutting, bargain sales, and advertising of low prices tends to reduce excessive purchases of alcoholic beverages.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148.) We cannot call such an assumption irrational. In upholding the validity of state statute limiting retail liquor licenses to two per person, the New Jersey Supreme Court held that in formulating its policy the Legislature could properly accept 'widely held views as to sound liquor control,' including the 'beliefs that the consumption of liquor is elastic rather than inelastic, [and] that price cuttings and their advertisement, along with comparable practices, are undesirable in the liquor field as tending to stimulate consumption. . . .' (Grand Union Co. v. Sills (N.J. 1964) 204 A.2d 853, 859.)

"Our Legislature may have sought to prevent the special inducement to purchase liquor which results from loss leaders, price-cutting and bargain sales at the retail level. (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148-149.) That the Legislature did not also seek to prevent intemperance by limiting the volume of liquor sales, by regulating competition among producers and wholesalers, or by establishing high liquor prices generally, creates no constitutional infirmity. As we said in Board of Education of City of Los Angeles v. Watson (1966) 63 Cal.2d 829, 833, 'The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident.'

"The selectivity of our Legislature's approach to the problem of intemperance might reflect a variety of entirely legitimate considerations. Thus the Legislature could have reasoned that some people might respond more impulsively to bargain sales of their preferred brand than to bargains offered by competing brands. Or the Legislature might have concluded that unregulated competition among the relatively few liquor producers and wholesalers would not unduly stimulate liquor consumption but that similar competition among the large number of retailers, who come into direct contact with consumers and who are more vulnerable to economic pressure, would stimulate selling

practices calculated to induce intemperance. We cannot say that all of these suppositions would have been 'palpably arbitrary and beyond rational doubt erroneous.' (In re De La O (1963) 59 Cal. 2d 128, 153; State of California etc., v. Ind. Acc. Com. (1957) 48 Cal.2d 365, 371.)

"Plaintiff calls our attention to the fact that the New York Moreland Commission (see New York State Legislative Annual (1964) 401-408, 484-489, 498-500) found that mandatory retail price maintenance did not significantly reduce the consumption of alcoholic beverages. We note, however, that the response to the Moreland Commission Report in New York came from the Legislature (Session Laws of New York, 1964, ch. 531, § 11), not the courts. Legislative revision of a statute cannot be equated to its death knell by judicial decree.

"We turn to the second legislative purpose: the promotion of the orderly sale and distribution of alcoholic beverages. Retail price wars among liquor distributors may encourage retailers, struggling to withstand the pressure of ruinous competition, to sell liquor below cost in violation of Business and Professions Code section 17043 or to transgress the regulatory laws governing retail liquor distribution (Bus. & Prof. Code, §§ 25600-25666).[9] To the extent that the retail price

"[9]As one court put it; 'The liquor industry is *sui generis*. If conditions of competition come about that threaten the economic existence of a vast number of small retailers, there exists a real threat that they may take illegal shortcuts to maintain their solvency, to the detriment

(This footnote is continued on the next page)

maintenance provisions eliminate retail price wars in the liquor industry, they undeniably discourage such disruptive practices.

"The Legislature may likewise have concluded that giant retailers and chain markets should be afforded no opportunity to use loss leaders in branded liquor to attract customers in disregard of Business and Professions Code section 17044 and thus ultimately to force smaller retailers out of business. Such tactics, the Legislature may have thought, would disrupt orderly distribution by endangering the continued vitality of one method of marketing: the corner grocery store. The Legislature may have decided not to expose these channels of distribution to possible economic destruction through manipulation by powerful competitors, of so highly volatile and attractive a product as branded liquor.

"Plaintiff answers that the instant legislation reaches unnecessarily far in this respect because the kinds of marketing disruptions that we have described may be curtailed by present statutes. But, in the first place, even assuming that the Legislature did no more than fashion further means of proscribing previously prohibited practices (Bus. & Prof. Code, §§ 25600-25666; Id., §§ 17000-17101), we see no ground for unconstitutionality in such duplication. The possibility

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of the industry and the harm of the public.' (Grand Union C. v. Sills (N.J. 1963) 194 A.2d 591, 595, affd. Grand Union Co. v. Sills, supra, 204 A.2d 853. See also Schwartz v. Kelly, supra, 140 Conn. 176, 180; Supreme Malt Products Co., Inc. v. Alcoholic Beverage Control Commission, supra, 334 Mass. 59, 62.)

that 'other less stringent . . . regulations might have sufficed is not our concern; that is a matter lying within the discretion of the legislative body.' (Nat. Milk etc. Assn. v. City etc. of S.F. (1942) 20 Cal.2d 101, 115.)[10]

"In the second place, the Legislature may have intended more than the fortification of existing statutory regulations. It may have sought to fill the gap between price-cutting procedures pursued in practice and those proscribed by law. The Unfair Practices Act (Bus. & Prof. Code, §§ 17000-17101) does not offer a facile means for the prevention of all below cost and loss leader selling; the requirements of proof of such selling under the act are stringent and for this reason the act is rarely invoked. The Legislature could certainly have concluded that such legislation would be of small comfort and little aid to independent retailers in their struggle against large-scale price-cutting competitors.

"Whatever dangers the Legislature thought implicit in disorderly marketing, we cannot question the wisdom of its concern. As we said in another context, 'Where the Legislature has determined that a defined condition or activity is a nuisiance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely be-

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"[10]The principle that even a legitimate governmental purpose 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved' (Shelton v. Tucker (1960) 364 U.S. 479, 488) has no application to a purely economic regulation, impinging in no significant way upon the dignity or freedom of the individual.

cause in its independent judgment the danger caused by a violation was not significant.' (City of Bakersfield v. Miller (1966) 64 A.C. 95, 102.)

"Finally, plaintiff contends that the retail price maintenance provisions, even if reasonably related to either or both of their declared objectives, cannot be justified as an exercise of the police power because their 'real' purpose and effect is not to regulate the sale of alcoholic beverages in the public interest but to swell the profits of the liquor industry.

"Insofar as plaintiff's contention focuses on the legislative *purpose,* it amounts to a suggestion that we should not take the Legislature at its word but should instead decide for ourselves, by a process which remains unexplained, what the Legislature 'really' intended to achieve by enacting the provisions in question. Although several courts have acceded to that suggestion, we do not believe that we are either authorized or equipped to undertake so ill-defined and hazardous an inquiry. '[T]his court may not presume that in reaching its decision [the Legislature] acted upon improper motives. ". . . a judiciary must judge by results, not by the varied factors which may have determined legislators' votes . . ." [citations].' (Werner v. Southern Cal. etc. Newspapers, supra, 35 Cal.2d 121, 129.) 'Nor can legislation be set aside by courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it [footnote omitted].' (Cohen v. Beneficial Loan Corp. (1949) 337 U.S. 541, 551.)

"Insofar as plaintiff's contention focuses on the legislative *effect,* we cannot fail to recognize it as an invitation to hold the law invalid because we disagree with its desirability. As we have said, we cannot invalidate legislation merely because we do not approve of its potentially beneficent impact upon a particular segment of society.

"At its base, the argument that the statute is unconstitutional because of its supposed bias in favor of the liquor industry rests upon a wholly unrealistic view of the legislative process. As our social and economic life grows in complexity, legislation necessarily increases in the differentiation of its techniques and in the specialization of its objectives. Thus the endeavor to achieve the general welfare of the whole through the special weflare of each part becomes ever more necessary. By protecting the interests of complaining constituents through legislation tailored to meet their particular needs, the Legislature can seek to maximize the satisfaction of society as a whole. Surely courts should not inject themselves into this inherently pluralistic process of compromise by attempting to reserve to themselves a power to veto the balance struck because of a bare belief in its undesirability.

"Plaintiff's second basic challenge to the constitutionality of the retail price maintenance provisions is that they unlawfully delegate legislative power by enabling each producer and wholesaler to set the price below which retailers may not sell his product. We rejected precisely that contention in Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 149-152, just

as we rejected a similar contention in sustaining the general Fair Trade Act (Bus. & Prof. Code, §§ 16900-16905) against a challenge of unlawful delegation in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 888. We see no reason to depart from those holdings.

"To contend that the Alcoholic Beverage Control Act unlawfully delegates legislative power is to misconceive the nature of the power which is purportedly delegated. The power we analyze here finds expression in the private act of the producer in entering into a contract setting a price for the resale of his own brand. *Scovill* tells us that this act is not the performance of a legislative function and not the exercise of an unlawfully delegated power. Nor does plaintiff directly question *Scovill.* Yet, if the producer's contractual designation of a resale price binding on all retailers is not the exercise of an unlawfully delegated legislative power, the statutory *requirement* that he designate that price cannot transform his act into the exercise of such a power. The statutory requirement clearly confers no *power* on the producer that he would not have possessed without it.

"*Allied Properties* makes this point abundantly clear. In describing the alleged delegation, the opinion in *Allied Properties* states that 'the function performed by the persons who assertedly exercise delegated legislative powers is the same under the general Fair Trade Act and the Alcoholic Beverage Control Act.' (P. 149.) The opinion points out that the act of designating a resale price binding on

all retailers is '"no more legislative in character than are other acts . . . of private parties undertaken as a prerequisite to the application of a statute."' (P. 149.)

"To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to overlook the crucial distinction between the fixing of a price for *all* products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold.[13] As *Allied Properties* explains (pp. 151-152), this distinction finds dramatic illustration in the difference between the instant legislation and the statute involved in State Board of Dry Cleaners v. Thrift-D-Lux Cleaners (1953) 40 Cal.2d 436.

"The court in *Thrift-D-Lux* declared unconstitutional a statute which delegated to the State Board of Dry Cleaners the power to fix minimum prices. (Bus. & Prof. Code, §§ 9560-9567, repealed by Stats. 1957, ch. 1691, § 11.) The statute entrusted the board with the power to decide, in terms of the public health and safety, which cities should have minimum price schedules, which serv-

"[13]The Alcoholic Beverage Control Act delegates to the producer no power which he could not in theory achieve unilaterally. The producer could, subject of course to the antitrust laws (see, e.g., Simpson v. Union Oil Co. (1964) 377 US 13)) maintain his own retail outlets or place his goods on consignment and thereby reserve full control over their retail price without the aid of price maintenance legislation of any kind. The infeasibility of such vertical integration in the liquor industry should not be permitted to obscure the fact that the Legislature has simply attempted to simulate some of the marketing conditions which would prevail if vertical integration were to take place.

ices should be included in those schedules, and what prices should be charged for the services. As *Allied Properties* points out, the court in *Thrift-D Lux,* in holding the statute unconstitutional, relied on the ground that there was a delegation of legislative power without ascertainable standards to an administrative board composed mainly of members of the industry who would participate in fixing prices to be charged by their competitors. . . . On the other hand it was held in Scovill Mfg. Co. v. Skaggs, etc. Drug Stores, supra, 45 Cal.2d 881, 887-888, that there was no delegation of legislative power where manufacturers, acting in their private capacity under the general Fair Trade Act, fixed the prices for which their own products were to be sold at retail by persons who were not their competitors. The distinguishing factor is that the dry cleaners' board was directed to fix uniform minimum prices for the services of all dry cleaners in limited areas on the basis of what it believed was required by public health and safety, whereas under the general Fair Trade Act each manufacturer is to fix retail prices for his own products in accord with his personal interest.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 151-152.)

"When the power which the Legislature purports to confer is the power to regulate the business of one's competitors, as in *Thrift-D-Lux,* or the power to exclude potential competitors from an entire industry or occupation, as in Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 235-236, a real danger of abuse arises, and the

courts accordingly insist upon stringent standards to contain and guide the exercise of the delegated power.

"A similar insistence upon stringent standards would serve little if any purpose in the case of the Alcoholic Beverage Control Act. As we noted in *Allied Properties* (53 Cal.2d pp. 151-152), that act authorizes no individual or group to exercise either regulatory or exclusionary power over any competitor, actual or potential. The Legislature has not authorized anything resembling 'price-fixing' in the traditional, horizontal sense: it has authorized no one to fix the price charged by a competitor. Thus the Alcoholic Beverage Control Act does not create the special danger threatened by a statute which delegates *industry-wide* regulatory power to interested members of the regulated industry.

"To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers,[15] coupled with the bargaining power of

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"[15]At the time of the transactions in question, section 24755 of the Business and Professions Code required, and section 24750 permitted, retail price maintenance only as to brands which were 'in fair and open competition with alcoholic beverages of the same general class.' Although some commentators took the view that this limitation had little practical effect (see, e.g., Herman, Free and Open Competition (1957) 9 Stan.L.Rev. 323, 327), the Legislature could reasonably have reached a different conclusion. Moreover, apart from the 'fair and open competition' clause, the Legislature, as we said in Allied Properties (53 Cal.2d p. 148), 'could reasonably proceed on the theory that the public will be adequately protected against excessive prices by the ordinary play of competition between manufacturers.'

those low-overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices. In all probability, that safeguard is at least as effective as any which the Legislature could be expected to provide by promulgating explicit standards for the setting of retail prices, enforcible by an administrative or judicial agency.[16] To impose a requirement of expressed legislative standards would here reflect 'little more than a judicial fetish for legislative language, the recitation of which [would provide] no additional safeguards to persons affected by the exercise of the delegated authority.' (Warren v. Marion County (1960) 222 Ore. 307, 314; see also 1 Davis, Administrative Law Treatise, § 2.15, pp. 148-151 and 1965 Supp., pp. 52-55; Jaffe, Law Making by Private Groups (1937) 51 Harv.L.Rev. 201, 248-251.)

"In light of these observations, we find transparently erroneous the arguments that the statute unlawfully delegates 'price-fixing' power because (1) the producer *must* set the price which will be observed in resale; (2) the law imposes an obligation upon all people in this state to observe that price; and (3) the violation of the act is a 'public offense.'

"All three arguments ignore the basic difference between a statute requiring the unilateral designation by each producer of the resale price of his own product and a statute requiring the multi-

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"[16]The extraordinary difficulty of formulating meaningful price guidelines suggests that any legislative effort to do so here might well have proven utterly futile. (See, e.g., Fulda, Resale Price Maintenance (1954) 21 U.Chi. L.Rev. 175, 182 fn. 33.)

lateral observance by all competitors of a fixed minimum price of a commodity. That the private act of specifying a resale price is lifted by the statute beyond the contracting producer and retailer to a publicly enforced observance by all retailers within the state does not convert the legislation into a 'price-fixing' statute, since the law still empowers no one to regulate the retail price of any commodity.

"Although the Alcoholic Beverage Control Act *requires* (Bus. & Prof. Code, § 24755), whereas the Fair Trade Act merely *permits* (Bus. & Prof. Code, § 16902), producers and wholesalers to set retail prices, this mandatory aspect of the Alcoholic Beverage Control Act 'does not render the function of a producer or wholesaler legislative in character but, to the contrary, decreases his discretion since he is not free to determine whether fair trading should occur. While mandatory fair trading means that retailers cannot obtain merchandise free from price restrictions, this is due to the determination of the Legislature, not the action of the producers and wholesalers.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 150.) The mandatory feature of the act endangers none of the interests which the anti-delegation doctrine seeks to protect, since it threatens neither the principle that truly fundamental issues should be resolved by the Legislature nor the precept that a grant of authority should be accompanied by safeguards adequate to prevent its abuse. Thus it provides no reason to hold that the act unconstitutionally delegates legislative power."

III

The 1961 Amendments to the California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System for Liquor Do Not Eliminate the Requirements of Fair and Open Competition and Do Not Conflict With the Federal Anti-Trust Laws

Appellant erroneously contends in his jurisdictional statement that "When the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement." (Appellant's Jurisdictional Statement, p. 14.) Hence, argues the appellant, California's mandatory minimum retail price maintenance system for liquor is now in violation of the federal anti-trust laws because the requirement of free and open competition has been eliminated by the 1961 amendment to the California law.

Such a contention rests upon erroneous premises, completely ignores the specific holding of the California Court of Appeal herein with respect to same, and its totally without merit.

Prior to 1961, the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor involved the use of the so-called "fair trade contract" as the vehicle for filing the minimum resale price with the California Department of Alcoholic Beverage Control. Following attacks by violating licensees on the validity of the "fair trade contracts" on various quasi-contract grounds (i.e. no mutuality of obligation, failure of consideration, non-sign-

er, etc., see *De Martini v. Department of Alcoholic Beverage Control,* 215 Cal. App. 2d 787 (1963), 30 Cal. Rptr. 668) the California Legislature in 1961, while retaining and authorizing "fair trade contracts" under the California Alcoholic Beverage Control Act (§§ 24750-24753, Calif. Bus. & Prof. Code), amended section 24755 of the Alcoholic Beverage Control Act so as to substitute a "minimum retail price schedule" in place of the "fair trade contract" itself as the vehicle to be used in filing the minimum retail prices with the Department of Alcoholic Beverage Control.

The use of the "minimum retail price schedule" as the filing vehicle in California's mandatory minimum retail price maintenance system is adopted from Connecticut's mandatory minimum retail price maintenance system for alcoholic beverages, which, as heretofore noted, has already been the subject of an appeal to this Honorable Court and this Court dismissed the appeal for want of a substantial federal question. (*Schwartz v. Kelly,* 140 Conn. 176, 99 A.2d 89, 346 U.S. 891.)

It may be noted that besides *California* and *Connecticut,* the unilateral filing of a minimum retail price schedule is the vehicle used to establish minimum retail prices in *Hawaii* (Rev. Laws of Hawaii 1955, Title 21, Ch. 159), *Massachusetts* (Mass. Gen. Laws, Ch. 138, § 25C), *Minnesota* (Laws of 1951, M.S.A. 340.97-340.978), *New Jersey* (Dept. of Law and Public Safety, Div. of A.B.C., State Reg. #30), and *New York* (wine) (N.Y. Consol. Laws, Ch. 3-B, § 101-bbb).

As set forth in the decision of the California Court of Appeal in *Reimel v. Alcoholic Beverage Control Appeals Board,* 256 A.C.A. 188, 64 Cal. Rptr. 26, at 34-

5 (1968) where the court was considering the same rgument which the appellant makes here:

"Nor do we deem the absence from section 24755 of specific requisite that the brands be in 'fair and open competition with alcoholic beverages of the same general class produced by others' to create a constitutional infirmity. Such fair and open competition is a positive requirement of the Cartwright Antitrust Law (Bus. & Prof. Code, §§ 16700-16758.) Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law. (Citation.)

"Respondents complain that the Department is no longer required under section 24755 to produce affirmative evidentiary proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that there was such a requirement prior to 1961. DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App.2d 787, 808-809, considering the pre-1961 Act, held that certain statutory presumptions[8] constituted evidence, in similar proceedings before the Department, that the filed price schedules were in fair and open competition. (Citations.) DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App. 2d, supra, pp. 813-814, also held that express findings that the products were in fair and open competition were not required." (Footnote omitted.)

Notwithstanding the power given to the states under the Twenty-first Amendment with respect to alcoholic

beverages destined for use, distribution or consumption within the states' borders (See Argument I, *supra*), this instant case does *not* present a conflict between state power under the Twenty-first Amendment and federal power under the Commerce Clause. The California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor sold at retail in California does *not* sanction horizontal price-fixing compiracies, combinations, monopolies, unfair trade practices, unfair competition, or any other violation of federal law.

As cogently noted by this Honorable Court[15] in *Seagram & Sons v. Hostetter,* 384 U.S. 35 at 45 (1966):

> "The appellants' contention that § 9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between § 9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-7 (1964 ed.), and §2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (1964 ed.).
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> *"In this as in other areas of coincident federal and state regulation, the 'teaching of this court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'* (Citation)" . . . (Emphasis added.)

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[15]Nor should it be overlooked that this Honorable Court has consistently upheld state sanctioned minimum resale price maintenance programs even as to ordinary commodities. (*Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 306 (1964); *Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936); *Schwegmann Bros. Giant Super Markets v. Hoffman-LaRoche, Inc.*, 221 F.2d 326 (1955), cert. denied 350 U.S. 839; *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F.2d 788 (1953), cert. denied 346 U.S. 856.)

In making his factual assertions and legal contentions concerning an alleged lack of, or non-requirement or, fair and open competition in the sale of liquor in California under California's mandatory minimum retail price control provisions, appellant simply fails to perceive and recognize that under California's past and present minimum resale price control provisions for liquor there is no conflict with the federal anti-trust and unfair practice laws presented.

The past and present policy of California with respect to the retail sale of liquor under the mandatory minimum retail price control provisions—as said policy is expressed in sections 23001 and 24749 of the California Alcoholic Beverage Control Act—does not sanction or permit, nor do the provisions themselves sanction or permit, in any way, horizontal price-fixing conspiracies or restraints of trade, anti-trust violations, or vertical unfair trade practices. Hence, the federal government, as well as the State, may take action against any such violations, and correct any such abuses.[16]

In actual practice, the federal anti-trust and restraint of trade laws together with California's corresponding companion law foster and support the orderly functioning of the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor.[17]

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[16]*Burke v. Ford,* 389 U.S. 320 (1967); *Melrose Distillers, Inc. v. United States,* 258 F.2d 726 (4th Cir. 1958), affirmed 358 U.S. 878; *United States v. Maryland State Licensed Bev. Association,* 169 F. Supp. 431 (1959); *United States v. Maryland State Licensed Beverage Association,* 138 F.Supp. 685 (1956); *United States v. McKesson & Robbins,* 351 U.S. 305 (1955); California Bus. & Prof. Code, §§ 16700 et seq., 17000 et seq., 25503 & 25505; 15 U.S.C.A. § 1 et seq.

[17]The California Court of Appeal in *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal.App.2d 787, 809-

It is only against uncontrolled price wars, cut-rate sales and ruinous competition in the retail sale of liquor within its borders that California has resolutely set its statutory face.

Conclusion

It is respectfully submitted that the appeal should be dismissed for want of a substantial federal question.

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(APPENDICES FOLLOW)

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811 (1963) 30 Cal.Rptr. 668, 680-681, hearing by California Supreme Court denied, held that it was a matter of common knowledge in California (to the extent that California courts could take judicial notice thereof) that there are countless retail outlets in California merchandising countless brands of distilled spirits, which countless brands vie with each other for public favor.